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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

PEOPLE OF THE STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above cause on February 6, 1950.

OPINIONS BELOW

The opinions of the United States Court of Appeals (R. 164-183) are reported in 180 F. 2d 596, and the opinions denying the petition for rehearing (R. 184) are reported in 181 F. 2d 598. The District Court wrote no opinion in denying the petition to intervene filed by the State of California (R. 156-157.)

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 6, 1950 (R. 184). A timely petition for rehearing was denied on April 20, 1950 (R. 184). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

The United States brought suit in the Northern District of California against a private California ditch company to quiet its title, and to declare its priority, to the use, upon specified federal lands and projects in Nevada and California, of certain waters of the Truckee River system to which the defendant company claimed a prior appropriative right. The State of California sought intervention on behalf of the defendant, primarily in order to urge an equitable apportionment of the use of the waters of the Truckee River system between it and Nevada. The District Court denied intervention and the Court of Appeals reversed, holding that the State could intervene as of right. The principal questions presented are:

1. Whether California, either as *parens patriae* or as the asserted "owner" of all the waters within its boundaries, can enlarge the scope of the litigation by injecting the question of equitable apportionment between States into an ordinary District Court "private" action by the United States

against an adverse water-right claimant for a determination of rights to the use of water in a tributary of an interstate stream as they relate to that adverse claimant.

2. Whether California owns all rights to the use of water within the State, including those acquired by the United States or by other individuals, so that all those using water within that State are merely licensees of the State.[1]

STATEMENT

This action was instituted by the United States, on August 8, 1946, in the District Court for the Northern District of California, Northern Division, against the Sierra Valley Water Company, a California public service corporation, to obtain a declaration that claimed water-rights of the defendant company are subordinate and subject to water-rights of the United States (R. 2-15). The subject matter of the suit is rights to the use of water in the Little Truckee River, a natural stream rising in California and flowing entirely within that State to its confluence with the Truckee River at Boca, California (R. 3-4). The Truckee River rises at the outlet of Lake Tahoe in California, flowing across the State boundary into Nevada, and having its terminus in Pyramid Lake, Nevada (R. 3).

[1] Also presented is the related question whether the State of California has any right or privilege, under Rule 24 of the Federal Rules of Civil Procedure, to intervene at all in the present litigation.

The complaint, as amended, alleges that the United States owns water-rights in the Truckee River (to which the Little Truckee is tributary) for the irrigation of lands within the Pyramid Lake Indian Reservation and the Newlands Reclamation Project (both in Nevada), the latest priority date claimed being July 2, 1902; these rights are alleged to have been established by a decree rendered in 1944 by the United States District Court for the District of Nevada, concluding litigation commenced in 1913 (R. 4-6, 7). The United States also claims rights to the use of the water in connection with the Tahoe National Forest and the Boca Reservoir, both in California (R. 7, 10-14).

The complaint asserts that, subsequent to the latest priority date of the United States, (a) the defendant company diverted water from the Little Truckee River out of the watershed of that river and into the watershed of the Feather River, which flows wholly within California, and none of the diverted water returns to the Little Truckee; (b) despite long-prior notice of the rights of the United States, the Company sought an adjudication, in a 1936 California state administrative proceeding to which the United States was not a party, that it had a right to divert 60 second feet from the Little Truckee (claiming an 1870 priority) and a further right to divert from the Feather River the water which it had diverted into that stream from the Little Truckee; (c) the company secured an order, in

1940, from a California state court recognizing the diversion it claimed; (d) although it claimed only 60 second feet, the company constructed diversion works having a capacity of over 75 second feet and has actually diverted that amount from the Little Truckee; and (e) it contemplates the enlargement of the diversion and the construction of impounding works which will further impair and encroach upon the United States' rights (R. 7-9). The prayer is for a determination and declaration of the Government's water-rights, that the rights of the defendant company be adjudged subject and subordinate to those of the Government, and that the defendant be enjoined from infringing upon the Government's rights (R. 9-10, 14-15).

By answer filed May 22, 1948 (R. 15-36), the defendant company denies that the United States owns the water-rights set forth in the complaint, admits a diversion of 70 second feet from the Little Truckee, but claims the right to make such an appropriation by reason of an alleged priority date of 1870 (R. 16-22). By way of counterclaim, the answer also interposes the defenses of lack of jurisdiction because of the absence as parties of other water-users in California and Nevada, of prescription, and of estoppel (R. 25-36). An *ex parte* order of May 22, 1948 (not in the printed record) allowed the company to join as cross-defendants, with the United States, the Washoe

County Water Conservation District and the Sierra Pacific Power Company, and by a cross-complaint, filed the same day, the Sierra Valley Water Company asked the court to declare its rights in the water of the Little Truckee River superior to any right of these cross-defendants, and that the latter be enjoined from interfering with such rights (R. 25-36).

Thereafter, on June 14, 1948, the State of California moved for leave to intervene as a party defendant and attached to its motion a proposed answer (R. 145-153). In this answer, the State claims no right to the use of the water which is the subject of the action, but denies that the United States has the water-rights it claims, and avers that the defendant Sierra Valley Water Company has the rights it claims, at least as of 1913. The State prays for no award of any interest or title to itself, but asks that the court declare and determine the rights of the defendant Water Company to be "prior and superior to the rights of plaintiff [the United States] and of any other claimant thereto appearing herein" (R. 153).

As its reason and ground for intervention, the State's proposed answer asserts that (a) the Water Company (and its members) do not use all of the water it diverts from the Little Truckee, but unconsumed portions become part of the waters available to the Feather River area and are used by landowners in that region, (b) loss of this excess water

would seriously injure the economy of two California counties in that area by affecting agricultural prosperity, diminishing tax revenue, and harming other enterprises dependent on successful agriculture, and (c) since California "can utilize but a comparatively small portion of the water produced [by "the Truckee River stream system"] although a large portion is generated on California watersheds" it "seems equitable that a large part of the small portion available to beneficial use in California should not now be taken away and dedicated to the State of Nevada" (R. 150-153), which the State claims will occur if the United States prevails, since the Pyramid Lake Indian Reservation and the Newlands Reclamation Projects (two of the federal areas in connection with which the United States brought suit (*supra* p. 4)) are located in Nevada.

The United States filed a response to the motion to intervene, challenging, among other things, the State's attempt to enlarge the issues of the original action and "to inject into the action questions wholly foreign to the issues originally joined" (R. 154-156). An order denying the State's motion to intervene was entered by the District Court, on December 6, 1948, after briefs had been filed and the matter argued (R. 156-157).

On appeal by the State (R. 157), the Court of Appeals reversed and directed that intervention be allowed (R. 164-171). The majority of the court—

District Judge Hall and Judge Goodrich of the Third Circuit—held that the State should be permitted to intervene, both as owner of the waters and as *parens patriae,* and that it could properly raise the issues concerning the equitable apportionment of the waters of the Truckee River system between California and Nevada, which it had set forth in its proposed answer. Judge Pope dissented vigorously (R. 171-183). A petition for rehearing was denied (R. 184).

REASONS FOR GRANTING THE WRIT

1. (a). This case began as an ordinary suit between adverse claimants to the use of streamwaters for a determination of their comparative rights. The United States asserted the better right to use the water, in connection with specified federal lands and projects, because of early appropriation and of certain riparian interests; for its part, the initial defendant, the Water Company, denied these claims and put forward its own priority of appropriation. Such limited actions between competing water-users, of interstate as well as intrastate streams, are very familiar to the western states,[2] and are normally re-

[2] California courts frequently entertain such actions (e. g., *Burr* v. *Maclay Rancho Water Co.*, 154 Cal. 428), as do the federal district courts. E. g., *Brooks* v. *United States,* 119 F. 2d 636, 639 (C.A. 9), certiorari denied, 313 U. S. 594; *Rickey Land & Cattle Co.* v. *Miller & Lux,* 152 Fed. 11 (C.A. 9), affirmed, 218 U. S. 258); *Bean* v. *Morris,* 159 Fed. 651 (C.A. 9), affirmed, 221 U. S. 485; *Utah Construction Co.* v. *Salmon River Canal Co.,* 85 F. 2d 769 (C.A. 9); *Union Mill & Mining Co.* v. *Dangberg,* 81 Fed. 73 (C.C. D. Nev.).

solved among the claimants by determining which has made the earliest valid appropriation or has the better right. Cf. *Arizona* v. *California,* 298 U. S. 558, 565-566; *Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 98. The proceeding involves only the comparative individual rights of the parties, and, being wholly unconcerned with the delicate problem of the equitable apportionment of the waters of an interstate stream between States, is ordinarily subject to whatever interstate decree this Court may later enter in an original suit, or to the provisions of a later interstate compact. Cf. *Hinderlider* v. *La Plata Co.,* 304 U. S. 92, 106-108.

It is this restricted and manageable type of District Court action which has now been converted by California's intervention, sanctioned by the Ninth Circuit, into a different and highly complex proceeding, enmeshed in the separate proof and considerations which would be proper only in an original action, in this Court, between California and Nevada. That the State has intervened, and been permitted to intervene, in order to interject the large public issues relevant only to such interstate apportionment controversies—like those adjudicated in *Nebraska* v. *Wyoming,* 325 U. S. 589, and *Wyoming* v. *Colorado,* 259 U. S. 419—clearly appears from the State's pleading, its arguments below, and the Court of Appeals' opinion. The crux of the proposed answer (which contains no claim by the State itself to any of the waters

involved) is, first, that California is equitably entitled, as against Nevada, to a large part of the small portion of the Truckee River stream system available to it for beneficial use, and, secondly, that California's economy would be substantially affected if the United States were permitted to carry the disputed water into Nevada (R. 150-153). These prime reasons for intervention are explicitly restated in the State's briefs below, which repeatedly stress the doctrines of equitable apportionment among States of the benefits derived from the flow of an interstate stream and claim preemption under those principles.[3] The Court of Appeals' opinion approvingly paraphrases these contentions (R. 167-168, 169-170), places the State's right to intervene squarely on the ground that the United States is "seeking to take the water for use in Nevada, which would achieve the same result as if Nevada were seeking it * * *," (R. 170-171) and concludes that California has the right and standing to oppose that claim in this suit (R. 170-171).

(b). This enforced enlargement of the issues will result, if unreversed, in destroying, throughout the

[3] See, *e. g.*, the passages from the State's briefs quoted and referred to by the dissent below at R. 173, 177, 181, fn. 7, 183. Both the opening and reply briefs expressly sought to have the District Court directed to apply the rules of equitable apportionment announced in *Kansas* v. *Colorado*, 206 U. S. 46; *Wyoming* v. *Colorado*, 259 U. S. 419, 464-468; *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 102, 103; *Colorado* v. *Kansas*, 320 U. S. 383, 393-394; *Nebraska* v. *Wyoming*, 325 U. S. 589, 601, 609, 617-618, 621-622.

Ninth Circuit's jurisdiction, the accepted and beneficent rule that water-use claimants may test, in the District Courts, the limited issue of their respective individual rights. Instead, they will be subjected to being involuntarily cast, at the State's option, into the maelstrom of interstate water litigation, with all its delays, evidentiary burdens, and complexities. See Judge Pope, dissenting, at R. 176-177, 182, fn. 8.[4] This drastic transformation of the proceeding is not only gravely injurious to the original parties, but it is unnecessary to protect the State's interest since the result of the individual litigation is subordinate to interstate water adjustments resulting from a suit by the State in this Court or from an interstate compact.[5] Further, even if this hybrid and novel District Court equitable-apportionment proceeding is carried through to its end, it may very well turn out to be wholly useless since Nevada which is not a

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[4] Some of the more important streams rising in or traversing the States comprising the Ninth Circuit are: Washington: Columbia River and tributaries; Montana: Missouri River, Yellowstone River; Nevada: Carson River, Truckee River; Arizona: Colorado River; Oregon: Klamath River, Columbia River, Snake River; Idaho: Snake River, Boise River; California: Klamath River, Truckee River, Carson River, Colorado River, Sacramento River and San Joaquin River.

At the present time, the United States, which is only one of the many water-claimants in the Ninth Circuit, has some 17 water-rights cases in that region, pending or about to be instituted, in which the States can probably ground a claim to intervene, as of right, on the decision below.

[5] This Court has stressed the importance of interstate compacts as a method of settling interstate water disputes. *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 104-106.

party may, of course, disregard it at will. And intervention on the terms proposed by California and permitted by the court below has the additional vice of violating the established general principle, designed to free suits from undue complication, that an intervenor is limited to the field of litigation open to, and the issues that may properly arise between, the original parties. *Chandler & Price Co.* v. *Brandtjen & Kluge, Inc.*, 296 U. S. 53, 57-59; *Columbia Gas & Electric Corp.* v. *American Fuel & Power Co.*, 322 U. S. 379, 383.

At the same time, the decision below contravenes the constitutional and statutory provisions making this Court the exclusive forum for the judicial settlement of interstate water controversies, and substitutes District Court litigation in which only one of the interested States is a party. As Judge Pope's convincing dissent points out (R. 175-179), California's claims are quite appropriate for a complaint against Nevada, presented to this Court, based upon the doctrine of this Court's equitable apportionment cases, but they can have no place in the present action. This Court has exclusive jurisdiction of all controversies between two or more States (28 U.S.C. 1251(a)(1)), and Nevada is plainly an indispensable party to an action seeking division of the use of the waters of an interstate stream between her and California. *Arizona* v. *California*, 298 U. S. 558; *Nebraska* v. *Wyoming*, 295 U. S. 40, 43. She cannot be impleaded in the District Court, and that court would not have

jurisdiction even if she consented to have the controversy tried there. In contrast, the Ninth Circuit has itself held that neither State is necessary to a District Court suit for determination of individual water-rights, such as this started out to be. *Brooks* v. *United States,* 119 F. 2d 636, 643 (C.A. 9), certiorari denied, 313 U. S. 594. Moreover, in seeking to replace Nevada, not suable in the District Court, with the United States as the party defendant in a new type of lower court equitable-apportionment proceeding, California is in effect bringing an independent action against the United States to which it has not consented; the United States' position as plaintiff in the original action cannot be used as a peg on which to hang such extraneous cross-suits. *Illinois Central R. R. Co.* v. *Pub. Util. Comm.,* 245 U. S. 493, 504-505; *United States* v. *Shaw,* 309 U. S. 495; *United States* v. *U. S. Fidelity & Guaranty Co.,* 309 U. S. 506.

2. Another major error of the Court of Appeals lies in its holding that the State is the absolute owner of the waters of the streams within its boundaries, and all water-users no more than its licensees (R. 165-167, 168). Even if this extraordinary interpretation of California law were wholly correct, it would not sanction the enlargement of the issues—the injection of an interstate controversy over equitable-apportionment—which the court has allowed. For the State as "owner" would have no more right to try that type of controversy in the

District Court than the State as *parens patriae* or as sovereign; if admitted to the litigation as "owner," it would, like the other parties, be restricted to the class of issues available in individual water-right cases. *Supra*, pp. 8-13. Nevertheless, the view of California water legislation expressed by the majority below so flatly contradicts the California decisions, as well as the entire theory of western water law, that we believe it should not go unreviewed and uncorrected by this Court—reading of local law though it technically be. A divided holding of this character by the Court of Appeals for the Ninth Circuit, one of the two federal appellate courts specially concerned with water-rights in the dry regions, should not be permitted to disturb, with its direct and latent effects, a branch of the law so important to half of the country.[6]

The constitutional and statutory provisions on which the Court of Appeals relies[7] are common to many western states, and, as Judge Pope demonstrates (R. 179-180), they have never been construed as constituting a claim of *dominium* or true

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[6] The court's error is doubly serious because it adopted a position on ownership which the State expressly disclaimed in its opening brief in the Court of Appeals, which was admittedly never advanced in the District Court, and which it is far from clear that the State ever advanced at any stage of the litigation. See R. 165, fn. 3, 171-172, 178.

[7] These are set forth in the majority opinion below, at R. 166. Section 102 of the Water Code has its origin in the Act of April 8, 1911, Cal. Stats., p. 821. See *Palmer* v. *Railroad Commission*, 167 Cal. 163, 175, and the dissent below, R. 178.

state-ownership of the waters.[8] On the contrary, the California Supreme Court has most explicitly held that, at least as to water-rights acquired prior to 1911 (such as those claimed by the United States and the defendant Sierra Valley Water Company, in this case),[9] neither the State nor the public has any proprietary title or interest whatever. *Palmer* v. *Rd. Commission,* 167 Cal. 163, 167-168, 169, 172, 173-174, 175-176. Perhaps less explicit, but still quite plain, is the later holding that the 1911 statute, which first announced that water within the State "is the property of the people of the state of California" (*supra,* fn. 7, p. 14), was merely declaratory of the State's existing rights in waters pertaining to state-owned lands, and had no effect on other waters or water-rights. *San Bernardino* v. *Riverside,* 186 Cal. 7, 29-30; see also 13-14, 24-26. See Wiel, *Political Water Rights* (1922) 10 Cal. L. Rev. 111. And the whole course of water adju-

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[8] See also Bannister, *The Question of Federal Disposition of State Waters in the Priority States,* (1915) 28 Harv. L. Rev. 270, 287-288; Wiel, *Political Water Rights* (1922) 10 Cal. L. Rev. 111-112; *Walbridge* v. *Robinson,* 22 Idaho 236, 241-242; *Willey* v. *Decker,* 11 Wyo. 496, 533-534.

[9] With respect to the Pyramid Lake Indian Reservation, the complaint claims priority from 1859 (R. 4), and from 1902 and 1903 for the Newlands Reclamation Project (R. 5). Riparian rights of the lands composing the Tahoe National Forest (R. 12-13) for the most part go back at least to the cession from Mexico in 1848, as do most, if not all, of the Government's rights connected with western Indian and forest lands.

Perhaps the most valuable rights to the use of water in California stem from the periods prior to 1911. Rights to the waters of the San Joaquin Valley are illustrative. Cf. *United States* v. *Gerlach Live Stock Co.,* October Term, 1949, Nos. 4-9, decided June 5, 1950.

dication in that State shows that rights to the use of water, once acquired, are fully vested in the individual, and the State retains no vestige of ownership but only its normal police powers of regulation and control. Cf. *Herminghaus* v. *Southern Calif. Edison Co.,* 200 Cal. 81, 114, 117; *Antioch* v. *Williams Irr. Dist.,* 188 Cal. 451, 456, 463; *In re Maas,* 219 Cal. 422, 424; *Peabody* v. *Vallejo,* 2 Cal. 2d 351; *United States* v. *Gerlach Live Stock Co.,* October Term, 1949, Nos. 4-9, decided June 5, 1950, slip opinion, pp. 17-29. It is, we believe, a measure of the accuracy of the lower court's reading of California's law that it refers neither to these nor to any other California decisions.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

ARNOLD RAUM,
Acting Solicitor General.

JULY 1950

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1950

No. 206

UNITED STATES OF AMERICA,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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OCTOBER TERM, 1950

No. 206

UNITED STATES OF AMERICA,
Petitioner,
vs.
PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

STATEMENT.

On page 4 of the petition herein, reference is made to a decree rendered in 1944 by the United States District Court for the District of Nevada. The case

there involved is entitled *United States, Plaintiff, v. Orr Water District Company, et al., Defendants,* and is alleged in paragraph X of the complaint herein. The case involved all of the appropriations in Nevada above the point of diversion of the canal for the Newlands Project. The defendant herein was not a party and the decree cannot affect its rights.

ARGUMENT.

I.

THE SOLE INTEREST OF RESPONDENT IN THIS SUIT IS THAT OF PARENS PATRIAE. IT DOES NOT ASSERT OWNERSHIP OF WATERS WITHIN ITS BOUNDARIES.

At page 17 of our opening brief herein as appellant, it is said:

> "It is now fully understood that no state has exclusive ownership or control over the waters of an interstate stream as against claims in other states through which the stream flows. The first noteworthy decision on this point was *Kansas v. Colorado,* 206 U.S. 46, 41 L.Ed. 956 (1907). * * *"

Excerpts are then given from *Kansas v. Colorado,* 206 U.S. 46, 117, and *Wyoming v. Colorado,* 259 U.S. 419, 464, 465, 466. In the last excerpt quoted, it is said (259 U.S. 466):

> "The river, throughout its course in both states, is but a single stream ***wherein each state has an interest*** which should be respected by the other." (Emphasis supplied.)

In the recent case, *United States v. Gerlach Livestock Company,* 94 L.ed. 876, the States of California, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington filed a brief as *amici curiae.* Each of these states, with the exception of Kansas, has declared by statute that all waters within the state are "property of the public (or state)" or "belong to the public", and are subject to appropriation. Despite such declaration, the brief of these states in the *Gerlach* case, under the caption, "Interest of Amici Curiae", opens as follows (page 2):

> "*Amici curiae* are states in the arid and semi-arid West. Their interest is that of *parens patriae.*"

So here, respondent maintains that its interest as *parens patriae* is abundantly sufficient to entitle it to intervene. In each of the interstate cases before this Court, beginning with *Kansas v. Colorado,* the sole interest of the moving state was that of *parens patriae.* In no one of the cases was a state attempting to protect a diversion made by it as a state. The opinion of the lower Court herein aptly emphasizes this point in the discussion of its point (pages 7, 8):

> "The right of the State to intervene as *parens patriae* is equally clear."

II.

RESPONDENT DOES NOT SEEK HEREIN AN EQUITABLE APPORTIONMENT OF THE WATERS OF THE TRUCKEE RIVER EXCEPTING ONLY THE RECOGNITION OF THE NOW WELL-ACCEPTED PRINCIPLE THAT THE ESTABLISHED ECONOMY OF A COMMUNITY BASED UPON EXISTING USE OF WATER SHOULD BE PROTECTED.

Petitioner's brief is founded upon the dissenting opinion of Judge Pope. At pages 17, 18 and 19 therein, it is said:

> "Suppose we follow through on this required intervention and see what is likely to happen when the district court is required to find out whether California or Nevada has the greater over-all equity. Suppose the court should find that although the appropriations of the defendant Water Company are junior in point of time, yet in view of the economic and physical factors mentioned in the State's answer, the court agrees with the State that 'it seems equitable that a large part of the small portion available to beneficial use in California should not now be taken away and dedicated to the State of Nevada'. Suppose that ten minutes after such a decision is announced the State of Nevada takes its claims to the Supreme Court, where they belong. That it might do so, and that in such original proceedings, the district court's findings would be a complete nullity, seems to me to demonstrate the unsoundness of the majority's position. (p. 17).
>
> * * * * * * *
>
> But what must concern the State of California is the possibility that on the trial of this case the court might find that the priorities are with the plaintiff; and in that eventuality, the State must

> resort, as its answer undertakes to do, to an effort to secure for the State an equitable apportionment of the waters of the interstate stream in its capacity as *parens patriae* and in pursuance of the doctrine of Nebraska v. Wyoming, supra, and the other decisions which that case follows. I can find no fault with the statement of the State's claim made in its answer except that it has presented it to a court *which has no jurisdiction to entertain it and it is attempting to enter the wrong forum.*" (Pages 18, 19; emphasis supplied.)

Judge Pope fails to understand that all of the possible water-right claims of the State of Nevada for the waters of the Truckee River have been presented in this suit by the plaintiff, the United States. There has existed an unusual relationship between the Bureau of Reclamation (formerly the Reclamation Service) and Nevada. The Congressional Reclamation Act was adopted on June 17, 1902. On February 16, 1903, the Nevada Legislature adopted an Irrigation Act. The first paragraph of the preamble to the Act recited the full text of the Reclamation Act of June 17, 1902. The last recital of the preamble is as follows:

> "WHEREAS, It is the desire of the State of Nevada to cooperate in every way with the Secretary of the Interior in the construction, operation, management and maintenance of irrigation works in the State of Nevada under said Act; and it is to the interest of the State of Nevada that every inducement should be held out to the Secretary of the Interior by cooperative and helpful State legislation to enter upon the work of construction,

operation, management and maintenance as aforesaid; * * *"

Chapter 4, Nevada Statutes 1903.

Responsive to this spirit of enthusiastic cooperation the Truckee-Carson Project (now known as the Newlands Project) was constructed to irrigate lands in the lowest valley of the Carson River Basin by diversions of water from both the Carson River and the Truckee River. The plaintiff herein has brought this suit in the interest of the Newlands Project for waters of Truckee River.

Paragraph X of the complaint herein (R. 7) is as follows:

> "For the purpose of having its rights adjudicated in the Truckee River, the United States, on the third day of March, 1913, instituted a proceedings to which reference has previously been made, entitled the United States, Plaintiff, vs. Orr Water Ditch Company, et al., Defendants, in the District Court of the United States, in and for the District of Nevada, pursuant to which, after many years of extended litigation, there was entered on September 8, 1944, the decree designated Exhibit 'A' of this complaint adjudicating the rights of the United States in the Truckee River."

The defendants in the *Orr Water Ditch Company* case were all the appropriators of Truckee River water in Nevada above the diversion point of the canal of the Newlands Project. The lower diversions for the Pyramid Lake Indian Reservation are set

forth in paragraph V of the complaint herein. (R. 4, 5.)

It is apparent that plaintiff, the United States, is in full command of all diversions from the Truckee River for use in Nevada. Nothing could be gained by Nevada taking "its claims to the Supreme Court, where they belong" (per Judge Pope, p. 17). That "taking" has been done for it by the more powerful claimant, the United States.

But entirely aside from the fact that Nevada has no additional rights to present, the presence of Nevada herein, or in a separate suit before this Court, could have no possible effect on the application of the rule that the established economy of a community must be maintained. Nothing Nevada can produce could obstruct in any way the application of this rule herein. The case, *Brooks v. United States,* 119 F. (2d) 636, is not in point against this conclusion.

The *Brooks* case deals with the waters of the Gila River, a stream rising in New Mexico and flowing into Arizona. As disclosed by an earlier appeal, *Gila Valley Irr. Dist. v. U. S.,* 118 F. (2d) 507, the original action was brought by the United States on its behalf and as trustee for the Indians in the San Carlos and Gila River Indian Reservations. The action was brought against all the canal companies and water users along the Gila River in both New Mexico and Arizona. All such claimants and water users joined in a stipulation adopting the decree. No question of jurisdiction was raised in the original action.

The *Brooks* case, 119 F. (2d) 636, is an appeal from an order adjudicating the appellants, New Mexico water users, guilty of contempt of Court for having violated the injunctive feature of the stipulated decree. The question of jurisdiction was raised for the first time in this contempt proceeding, but there was no attempt made by New Mexico to intervene. The fact that there was a stipulated decree indicates that there was no discussion of the application of the doctrine of out-of-priority entitlements on interstate streams. It is certain that the clear statement of this doctrine was not laid down by the Supreme Court until *Nebraska v. Wyoming,* which was subsequent to the *Brooks* case.

It thus clearly appears that the United States, as plaintiff herein is in a position to present to the Court every claim which the State of Nevada has or could have to the waters of the Truckee River System, and that the presence of Nevada in the case, either as a party or as an intervenor, could add nothing to that State's status or in any way affect its rights to any waters of the system.

It is equally clear that the present effort of the United States as plaintiff herein is to withdraw from use in California and to store in Boca Reservoir *all of the water* now being utilized in Sierra Valley for agricultural and irrigation purposes, not because this water is presently needed or required in Nevada but apparently upon the off chance that some day there *might be* a scarcity of water in the reservoir and

therefore the water here in question should be allowed to flow into the reservoir to offset such a possible, but not probable, shortage.

The complaint herein seems to show very clearly that the concern of the United States as plaintiff is entirely bound up in its own activities in Nevada, in connection with the Newlands project, and that no concern whatever is felt for the unfortunate and possibly disastrous effects upon the people and the communities of Sierra Valley and the economy, health, happiness and prosperity of the people of Sierra and Plumas Counties.

In our reply brief herein filed in the United States Court of Appeals, at page 29, we had occasion to refer to this attitude of the United States and we there said:

> "It is difficult to understand the attitude of the United States in this case on the question of intervention. After all, California is *one* of the forty-eight States of the Union and is deserving of thoughtful consideration in respect to her plea for a right to intervene, yet the position of the United States is so adamant against such intervention that there is grave cause to wonder as to the reasons, policies or considerations producing such an attitude on its part. Surely there must be something beyond a desire to protect, at all costs, the plans of the Interior Department and the Bureau of Reclamation in respect to the Newlands project. Admittedly, that is a large and important project. However, it concerns only one state, Nevada, and we have difficulty in under-

> standing the apparent prejudice and animosity of the United States against the State of California and in favor of a sister State in such an important matter as the use of water from an interstate stream having its source in California. California is asking only the right to intervene in this action so that there may be presented to the Court for adjudication such interest as the State may have in connection with the interest of the defendant water company herein. Therefore, since the State is not suing the United States or being sued by the United States, it seems to us that the harsh and uncompromising attitude of the United States in respect to our plea for leave to intervene is uncalled for and is contrary to that spirit of fair play which should characterize even the representatives of the United States when dealing with a sovereign State."

No explanation has been forthcoming and so we are left with the sorry conclusion that the United States regards California's protests with a jaundiced eye and as worthy of no consideration whatever. How different, by comparison, was the attitude of the Court in *Percy Summer Club v. Astle,* 110 Fed. 486, where, at page 488, the Court said:

> *"It would be especially unbecoming for the federal courts to pass on a great question in which a sovereign state of the Union has a direct interest, if not as lord paramount, at least as representing all its citizens, without affording it an opportunity to be heard before the legal proceedings in which the question is involved are concluded.* It is in accordance with these principles of justice

that interventions of the class in question have been, as already stated, most freely allowed in federal courts. * * *" (Emphasis supplied.)

III.

INTERVENTION BY CALIFORNIA WILL CERTAINLY RESULT IN AN EARLY DISPOSITION OF THIS SUIT.

Much is said by petitioner, and by Judge Pope, as to the probable delay if California be allowed to intervene. Reference is made above to the *Orr Water Ditch Company* case. That case was initiated by the United States on March 3, 1913, and the decree was entered on September 8, 1944. *That is a period of 31½ years.*

The *Orr Water Ditch Company* case deals only with the waters of the Truckee River. The Newlands Project uses the waters of Carson River also. To protect its interest in the Carson River waters, the United States brought the suit, *United States v. Alpine Land and Reservoir Co., et al.,* on May 11, 1925. It is still pending and the Master's report has not yet been filed or served. It is now over *25* years since the Carson River suit was initiated. No one can forecast the date of its termination.

If the present case be allowed to proceed as plaintiff desires, there is no way of telling how many years would be consumed. As against this uncertainty is the relatively insignificant period it would take respondent to prove its claim as to the established economy of the region as set forth in the opinion of the lower Court (pp. 4, 5). When it is admitted that

the defendant herein is entitled to the benefit of the out-of-priority doctrine of the interstate-stream cases, there is nothing left to this suit. There is no longer any need of tracing through the intricate proof the extent of the rights of plaintiff.

But there is more to this. If this Court should hold that respondent is not entitled to intervene, and respondent should allow this case to proceed in the ordinary way to termination, there would be no way to stop California from initiating a suit against Nevada in this Court. Judge Pope and petitioner concede that such action would nullify all that was done in the instant case.

So far as time is concerned, it is clear that the best way out in this situation is to grant respondent's petition to intervene.

IV.

CONCLUSION.

For the reasons herein given, the petition for writ of certiorari should be denied.

Dated, San Francisco, California,
August 25, 1950.

Respectfully submitted,

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